

³ Mr. Green is an attorney admitted in the District of Columbia and New York, but not in Maryland. He coordinated for the opposition, but did not represent them. 1/21/11 Tr. 5.

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I. STATEMENT OF THE CASE

Petition S.E. 11-2, filed on August 19, 2010, requests a special exception to operate a child day care center for up to 30 children.⁴ The facility would be located in the basement and first floor of an existing one-family, detached home at 14315 Marian Drive, Rockville, Maryland, in the R-200 Zone.

Petitioner, who owns and resides in the home with her husband, has been operating a licensed child care business (*i.e.*, a “group day care home”) in her home for up to 12 children since February 2009 (Exhibits 11 and 20). There is no special exception for the existing group day care home because such a facility is permitted without a special exception in the R-200 Zone; however, a special exception is required to operate a child day care center in the R-200 Zone, pursuant to Zoning Ordinance §59-C-1.31(d). The day care facility is called “Little Genius Montessori Center.”

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On September 10, 2010, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on January 21, 2011, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 14).

The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a report dated January 5, 2011, recommended approval with conditions

⁴ A “child day care center” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “group day care homes” for up to 12 children. A “child day care center” is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
 - 1) for 13 or more children, or;
 - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
 - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

(Exhibit 28).⁵ The Montgomery County Planning Board (“Planning Board”) voted unanimously on January 13, 2011, to endorse the Technical Staff’s recommendations, but added a recommendation that the Hearing Examiner “consider a condition limiting the number of parents dropping off and picking up children during each hour of the staggered arrival/departure periods as specified in condition #4.” Memorandum of January 19, 2011 (Exhibit 34(b)).

The subject petition has engendered both considerable support and significant opposition from the community. Pre-hearing letters of support stressed the merits of the existing program (Exhibits 16-19, 22, 24, 25, and 29-31), which is reportedly “the only Chinese immersion program in a Montessori environment” in the County. Exhibit 20. A pre-hearing letter and petition in opposition, signed by 24 residents of the neighborhood, raised concerns about increased traffic volume, traffic safety, parking and appearance issues, and possibly increased noise and disruption of the neighborhood which may be occasioned by the increased enrollment proposed for the facility. Exhibit 27(a). Similar concerns were raised in other pre-hearing opposition letters (Exhibits 33(a) – (g)).⁶

The hearing was convened, as scheduled, on January 21, 2011, and testimony was presented in support of the petition by Petitioner and nine other witnesses. With one exception,⁷ Petitioner adopted the findings and conclusions in the Technical Staff report as a part of her testimony and agreed to the conditions Staff recommended. 1/21/11 Tr. 15 and 140.⁸ Testimony in support from nine witnesses extolled the virtues of the day care program currently run by Petitioner and the need

⁵ The Technical Staff report is frequently quoted and paraphrased herein.

⁶ The Technical Staff report asserts that there is no evidence of concern from the adjoining neighbors about this petition (Exhibit 28, p. 6), but Staff was apparently not aware of the opposition because the first opposition letter (Exhibit 27) was dated the same date Technical Staff’s report was issued; however, the Planning Board’s memorandum (Exhibit 34(b)) indicates that it was aware of the community’s concerns.

⁷ The one exception is that Technical Staff mistakenly listed 174.43 feet (or 175 feet) as the lot width at the street line and at the front building line in the text on page 2 of the Staff report and in the table on page 5 of the Staff report (Exhibit 28). The actual lot width at the street line (*i.e.*, Marian Drive frontage) is about 330 feet, and it is over 300 feet at the building line. 1/21/11 Tr. 128-131.

⁸ The Hearing was held over two days, January 21, 2011 and April 1, 2011. Transcripts references are therefore identified by date.

for it in the community. 1/21/11 Tr. 28-45; 78-156; 188-190; and 205-294. Nine neighbors testified in opposition. 1/21/11 Tr. 46-77; 157-187; 191-204; and 295-385. The vast majority of the opposition testimony addressed concerns about traffic volume and safety and parking. Neither side called a transportation expert or traffic engineer to testify.

The record was held open until February 21, 2011, to permit both sides to file written closing arguments and to allow any party the opportunity to call a transportation expert, in which case an additional hearing date would be scheduled.⁹ Neither party elected to call a transportation expert; however, both sides filed new factual material with their closing arguments. Rather than disregard the arguably relevant, but untimely materials from both sides, the Hearing Examiner elected to reopen the record and schedule an additional hearing date on April 1, 2011, solely to allow both sides to address the newly proffered evidence. An Order to that effect was issued on March 8, 2011 (Exhibit 68).

The hearing resumed as scheduled on April 1, 2011, and was completed on that date. Eight new witnesses (including Petitioner's husband) testified in support of the petition, addressing the traffic, safety and parking issues, and opposition organizer, James Green, testified for the opposition. The record was held open until April 11, 2011, to allow time for the filing of the transcript, and it closed, as scheduled, on that date.

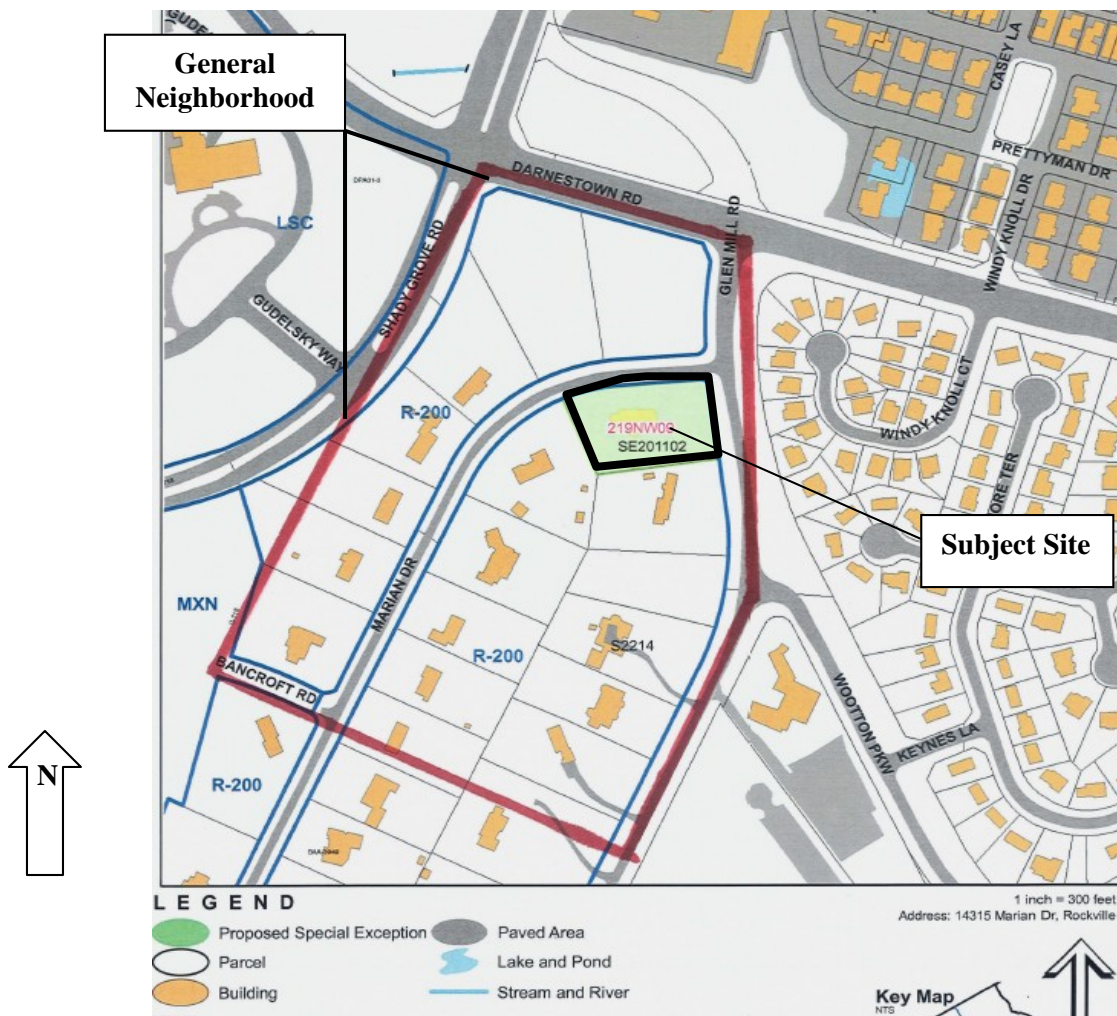
Based on a thorough review of the entire record, the Hearing Examiner concludes that the special exception should be granted, but that for at least the first year of operations, the number of children permitted at the site should not exceed 22. That number may be increased to up to 30, if approved by the Hearing Examiner at a follow-up hearing after one year of operations under the special exception, as spelled out in the conditions in Part IV of this Opinion.

⁹ The Hearing Examiner inadvertently scheduled the closing date on a holiday, so the record initially closed on the next day, February 22, 2011.

II. FACTUAL BACKGROUND

A. Subject Property and Surrounding Neighborhood

The proposed child day care center would operate in the finished basement of an existing, single-family, detached, two-story home,¹⁰ at 14315 Marian Drive, Rockville, Maryland. The property's legal description is Lot 1, Block A in the Hunting Hill Estates subdivision, and it contains about 1.344 acres (58,370 square feet of land). It is the first property on the southeast side of Marian Drive, located at the southwest corner of the intersection of Marian Drive and Glen Mill Road, as can be seen on the following Map appended to the Technical Staff report as Attachment 1:



¹⁰ As photographs in this report show, the home appears to be three stories when viewed from the rear, and there is ground level access in the rear to the lower (basement) level.

The property has about 330 feet of frontage on Marian Drive, and the lot width is over 300 feet at the building line.¹¹ 1/21/11 Tr. 128-131. Based on measurements on the Surveyor's Plat (Exhibit 6(a)) and the scale of the Site Plan, the frontage on Glen Mill Road appears to be 170 to 180 feet.¹²

The following photographs from Exhibit 12 show the subject site and the dwelling:



**Exhibit 12(b) – The subject site's northwest side from Marian Drive
(i.e., looking towards the southeast, in the direction of Glen Mill Road)**

¹¹ As mentioned in an earlier footnote, Technical Staff mistakenly listed 174.43 (or 175 feet) feet as the lot width at the street line (i.e., the Marian Drive frontage) and at the front building line in the Staff Report (Exhibit 28). Staff was apparently misled by seeing the number "174.43" on the site plan (Exhibit 3) and the Surveyor's Plat (Exhibit 6(a)), but that number referred to only a segment of the frontage.

¹² Staff erroneously listed the Glen Mill Road frontage as 90 feet. Exhibit 28, p. 2.



**Exhibit 12(d) – The subject site's northeast side from Marian Drive
(i.e., looking towards the southwest)**



Child Care Entrance

**Exhibit 12(j) – The Rear (south side) of the Dwelling, showing the Child
Care Entrance**



Exhibit 12(n) – The Rear Yard



Exhibit 12(m) – The Fenced Play Area in the East Yard

The dwelling is set back approximately 66.5 feet from Marian Drive, and it has a left side (west) yard of approximately 90 feet in width, a right side (east) yard of approximately 115 feet in width and a rear yard of approximately 80 feet, based on measurements listed on the Survey Plat and the scale of the site plan.¹³ The spaciousness of the site can be seen on the above photographs.

Technical Staff describes the dwelling as a two-story masonry dwelling with a basement. It was constructed in 2006. The property is accessed via an asphalt paved circular driveway from Marian Drive, as depicted in photographs on pages 7 and 8 of this Opinion.. The circular driveway is located in front of the dwelling and measures approximately 12 feet in width. There is also a three-car garage and a large area of paved blacktop adjacent to the garage which measures about 57 feet wide at its widest point and about 90 feet long. *See* photograph on page 7 of this Opinion.

Technical Staff defined the general neighborhood as bordered by Darnestown Road to the north, Glen Mill Road to the east, Bancroft Road to the south, and Shady Grove Road to the west. It is depicted in the map supplied by Technical Staff, which is reproduced on page 6 of this Opinion. The neighborhood is zoned R-200 for single-family residences. Single-family dwellings are present on both sides of Marian Drive, although the two lots directly across from the subject site are vacant. According to Technical Staff, there are no similar special exceptions within the neighborhood. Exhibit 28, p. 3.

Although it could be argued that the neighborhood should be defined more broadly given the possible additional traffic from the use, the Hearing Examiner accepts Technical Staff's recommended definition of the general neighborhood based on the fact that the use will not be visible beyond the neighborhood as defined by Staff, and the anticipated traffic volume impacts, as determined by Transportation Staff, should be small. Revised Attachment 11 to Exhibit 28.

¹³ Once again, some of these figures differ from Staff's figures in the text on page 3 and in the Table on page 5 of the Exhibit 28; however, whichever figures are used, the subject site easily meets applicable development standards for the R-200 Zone.

B. The Proposed Use, Parking, Landscaping, Lighting, Signage and Operations

1. The Proposed Use:

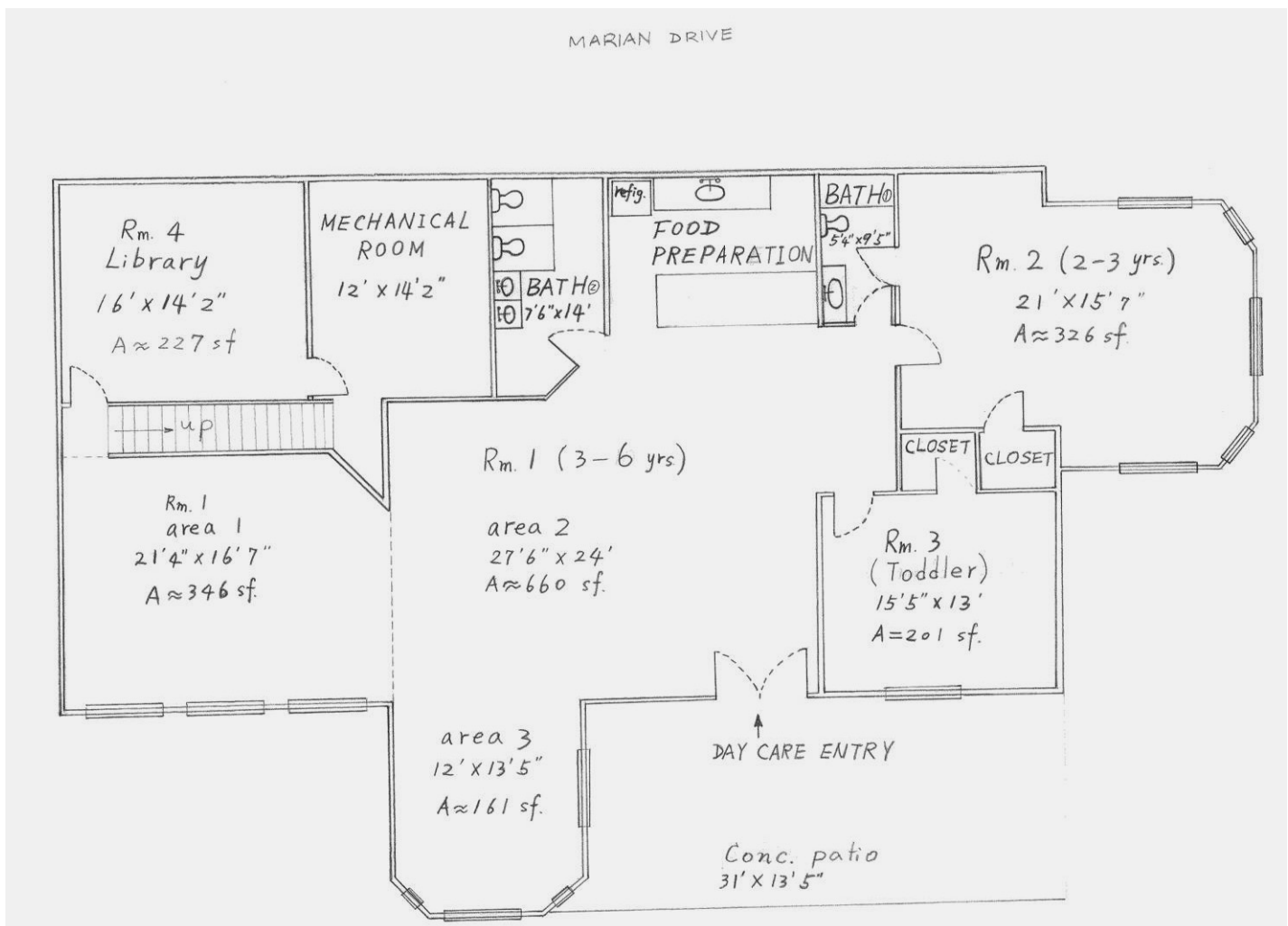
Petitioner, who owns and resides in the home with her husband, has been operating a licensed child care business (*i.e.*, a “group day care home”) in her home for up to 12 children since February 2009 (Exhibits 11 and 20). Petitioner proposes to expand the existing “group day care home” for up to 12 children into a “child day care center” for “up to 30 children, ranging in age from eighteen months up to six years old. There is no special exception for the existing group day care home because such a facility is permitted without a special exception in the R-200 Zone; however, a special exception is required to operate a child day care center in the R-200 Zone, pursuant to Zoning Ordinance §59-C-1.31(d). The day care facility is called “Little Genius Montessori Center.”

The child day care business will still be operated in the existing two-story dwelling owned by the applicant. The day care will be conducted on the lower level (walk-in basement) of the home, which is depicted below in photographs supplied by the Petitioner (Exhibits 12(ee) – (jj)):





The Floor Plan for the child care facility (Exhibit 5) is reproduced below:



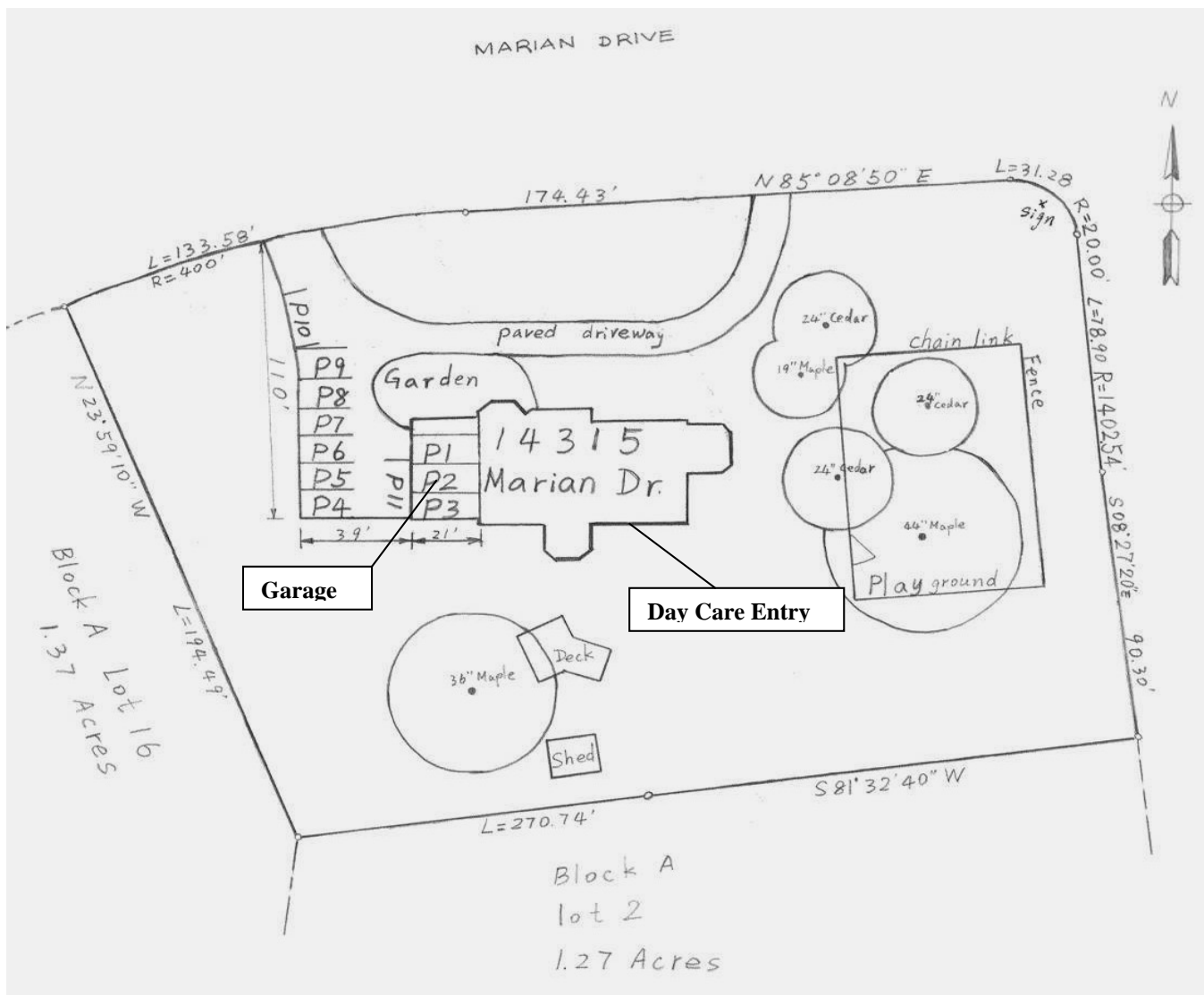
According to Technical Staff, Petitioner reported the size of the child care floor area as approximately 3,000 square feet in size. Exhibit 28, p. 3. Based on the Hearing Examiner's calculations, the square footage measurements of the child care area in the above floor plan, excluding the food preparation and bathroom areas, add up to 1,921 square feet. Thus, the square footage of the child care area appears to exceed the state's minimum requirement of 1,050 square feet for thirty children, but that determination will be made by state licensing authorities.¹⁴

There are no changes proposed to the exterior of the existing dwelling except the addition of a wooden fence recommended by Technical Staff for much of the site's perimeter to help ensure safety of the children. Exhibit 52. All of the activities associated with the business will be conducted within the home or in the rear yard. The outside play area for children is located in the east side yard and is enclosed with a 4-foot high chain link fence, as shown in the photo on page 9 of this Opinion and below in Exhibit 12(bb):



¹⁴ This figure is based on the State requirement, in COMAR 13A.16.05.03, that a child care center licensed after December 1, 1971, must provide a minimum of 35 square feet of indoor floor space for each child (30 X 35 = 1050).

The Site Plan for the special exception (Exhibit 3) is reproduced below:



GENERAL NOTES

1. Lot 1, as shown, is included on a Subdivision Record Plat recorded amount the land Records of Montgomery County, MD in Plat Book 55 as Plat 4407.
2. Legal Description: Lot 1, Block A, Hunting Hill Estate
3. Lot Size: 1.344 Acres
4. Existing zoning: R-200
5. Street Address: 14315 Marian Dr., Rockville, MD 20850
6. Proposed land use: Childcare center for up to 30 children
7. Limits of disturbance = 0
8. No forest will be cleared

Off Street Parking Space	Required	Provided
Children (30)	5	5
Resident Staff	2	2
Non-Resident Staff	3	4
Total	10	11

LEGEND

P1 - P3	Garage Parking Space (21' x 35')
P4 - P9	Perpendicular Parking Space (8 1/2' x 18')
P10, P11	Parallel Parking Space (7' x 21')

2. Parking:

In addition to Petitioner and her husband, the child care facility will have up to three full time non-resident employees and one part-time non-resident employee. The applicant intends to use the garage and the paved area on the side of the home and part of the driveway for parking cars associated with the business, as shown in the above site plan.

The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:

***Child day care facility.** For a family day care home or group day care home, one space for every non-resident staff member in addition to the residential parking requirement. The required number of spaces may be allowed on the street abutting the site. For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance. [Emphasis added.]*

Based on this provision, Technical Staff calculated that 10 parking spaces would be required – one (1) space for each of the three non-resident staff members (*i.e.*, 3 spaces), two (2) spaces for the residence, and one space for every 6 children (*i.e.*, five spaces). Exhibit 28, pp. 5-6. Staff does not appear to account for the parking for the non-resident part-time staff member, but since Petitioner is planning for eleven (11) off-street spaces, the Hearing Examiner finds that sufficient off-street parking will be provided to meet the statutory minimum.

On the other hand, one of the issues raised by the community in this case is whether the planned parking facility can function efficiently and whether excess vehicles will end up parking on Marian Drive, thereby creating a potential hazard.¹⁵ Exhibit 33(d) and 1/21/11 Tr. 312 and 348-351.

¹⁵ One community witness, Bryan Cook, also testified that the parking facility was overwhelmed with vehicles “dozens and dozens of times over the last couple of years,” though he admitted that the situation was not typical (1/21/11 Tr. 350). Mr. Cook introduced photographs to support this claim (Exhibits 27(b)(1)-(7)), but he indicated that he did not know whether the overflow parking resulted from some non-daycare event 1/21/11 Tr. 351-352. Convincing testimony was provided by Ming Yang, the director and the coordinator for the Good News Ministry Group, that the photographs in

The Hearing Examiner reported these concerns to Technical Staff (Exhibit 54) , which responded that they felt the parking area was sufficient, and that Petitioner could always use additional on-street parking, which is permitted on Marian Drive.

The Hearing Examiner differs from Staff on the latter point because the sentence in Zoning Ordinance §59-E-3.7 that permits on-street parking to make up a deficiency in the required number of spaces refers to family day care homes or group day care homes, not to child day care centers. In addition, the neighborhood raised significant concerns about pedestrian safety relating to cars parked on that section of Marian Drive. Nevertheless, the photographic evidence supplied by Petitioner convinced the Hearing Examiner that there is enough room on the surface of the proposed parking facility for it to function properly with the number of spaces proposed. These 27 photographs are in the record as Exhibits 64(a) – (n), two of which are reproduced below.¹⁶



question were taken during a gathering at Petitioner's home that had nothing to do with the day care operation. 1/21/11 Tr. 153-156. His testimony was supported by the testimony of another witness, Stacy Carr, at the follow-up hearing. 4/1/11 Tr. 19-25. The Hearing Examiner gives little or no weight to those photos of the overcrowded parking area because he finds that they do not pertain to the day care facility.

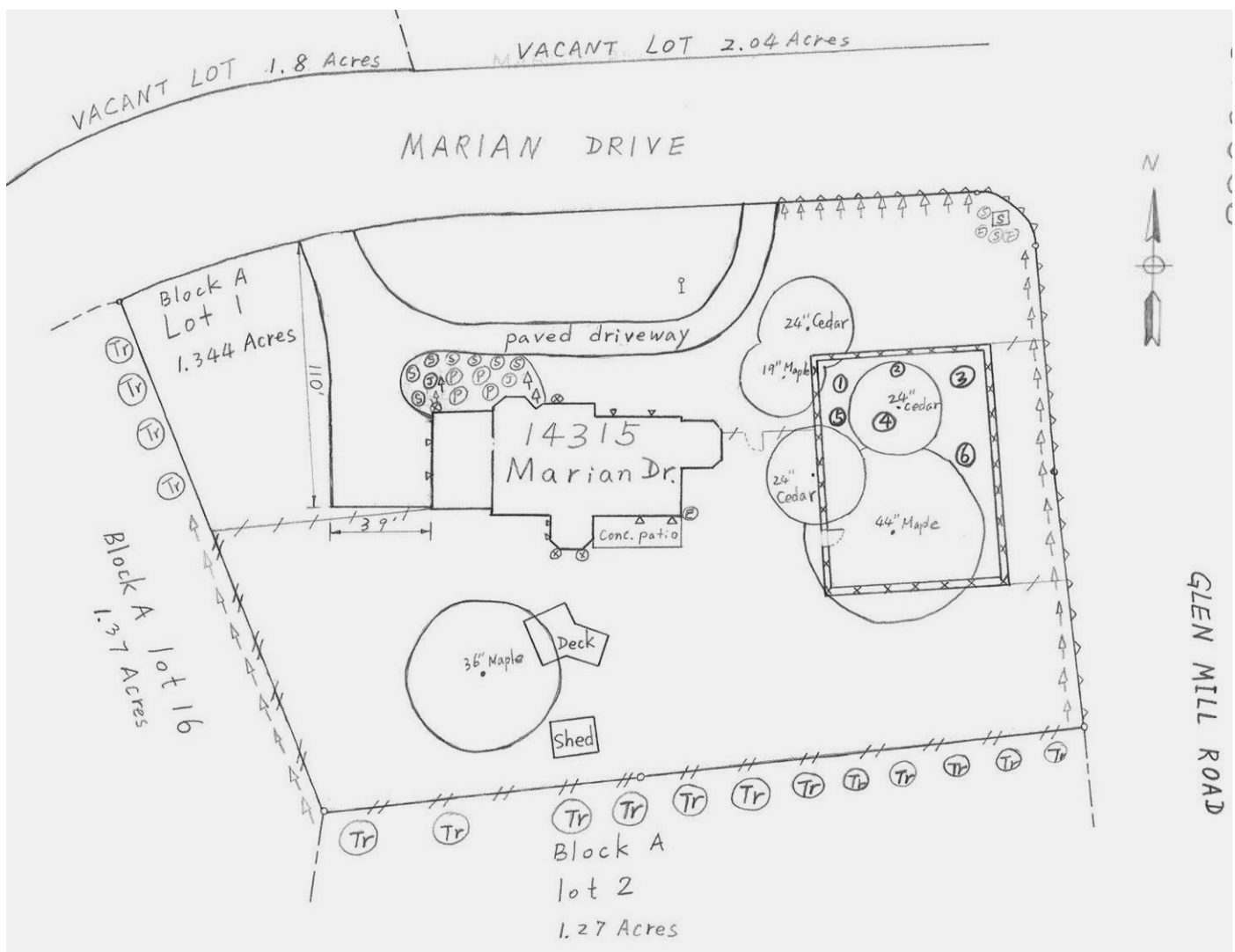
¹⁶ Petitioner also filed a CD and a DVD attached to her rebuttal "closing argument" (Exhibits 64(s) and (t)), which were filmed by her brother, Michael Zhang, purporting to show the functioning of the parking facility, but the Hearing Examiner

Therefore, the Hearing Examiner finds that the proposed parking facility is adequate to meet the day care's needs. If the Petitioner seeks to increase the number of children from 22 to 30 after one year of operation, the Hearing Examiner will receive further evidence on this issue at that time. It is not within the Hearing Examiner's authority to limit parking for events having nothing to do with the operation of the day care facility.






















Screening for the parking facility also appears to be adequate, as will be discussed in the following section of this Opinion.

3. Landscaping, Lighting and Signage:

The revised Landscape and Lighting Plan (Exhibit 21) is shown below, with the Legend and Notes reproduced on the next page:



LEGEND

	Lamp post		Wooden Fence (4')
	Motion sensor light		Chain Link Fence (4')
	Switch light		Sand box
	Pine Tree		Picnic Table 1
	Maple		Play set 1
	Shrubs		Play set 2
	Flowers		Picnic Table 2
	Evergreen		Dome
	Plants		Sign
	Trees		New Wooden Fence (6')
			New Wooden Fence (4')

LANDSCAPING AND LIGHTING PLAN

ILLUMINATION

Exterior illumination consists of residential-style fixtures, providing safety for parents and children entering and exiting the center without causing glare to surrounding properties. There are 50-watt lamps mounted on the brick front of the house, on the garage side, and at the back of the house. There are also 75-watt motion sensor lights in the front of house, at the corner of the garage, and along the back of the house. Along the circular driveway, besides a single lamppost (about six feet high), there are 20 solar lamps mounted on 1.5-foot high stakes to provide safety for cars driving by.

TREES

No additional tree planting is proposed. The eastern and northern sides of the lot, where the playground is located, are screened with 29 cypress evergreen pines. The neighbors to the south and to the west have many mature trees running along their property line, which provide further screening.

FENCING

The existing fencing along the southern and western sides of the property is in the wired 3-rail split style. A six-foot high wooden fence will be installed along the property line on Glen Mill Road and Eastern part of Marian Dr.

ROAD WITH A DIFFERENCE

Technical Staff discussed landscaping and screening in their report (Exhibit 28, p. 6):

The eastern and northern sides of the lot, where the playground is located, are screened with approximately 29 cypress evergreen pines. There are mature trees situated along the south and west property lines that provide further screening. An existing 3-rail fence is located along the southern and western sides of the property. The applicant notes that a six-foot high wooden fence will be installed along the property line on Glen Mill Road and the eastern part of Marian Drive, if the special exception is granted.

This screening can be seen in the following photographs (Exhibits 12(t), (aa), (r) and (x)).



Exhibit 12(t): Screening along Marian Drive (north)



Exhibit 12(aa): Screening along Glen Mill Road (east)



Exhibit 12(r): Screening along the rear (south)



Exhibit 12(x): Screening along the parking area (east)

Technical Staff described the lighting on site as follows (Exhibit 28, p. 6):

The exterior illumination consists of residential style fixtures, providing safety for parents and children entering and exiting the facility without causing glare to surrounding properties. There are several 50-watt lamps mounted on the front of the dwelling, on the garage side, and at the rear of the dwelling. Along the driveway, there is a lamppost (approximately 6 feet high) and approximately 20 solar lamps mounted on stakes to provide safety for vehicles. The lighting currently in place does not cause any glare onto adjoining properties.

There is no evidence in this case of excessive or non-residential lighting being employed on the subject site. Based on this record, the Hearing Examiner finds that the proposed screening and lighting on the site are appropriate.

There is an existing, non-illuminated, free-standing sign identifying the name of the child care center, “Little Genius Montessori Center, ” and the telephone number of the business. It is depicted below (Exhibit 12(g)):

Northeast view : Sign at the corner of Glen Mill Rd. and Marian Dr.



The sign is located at the corner of Glen Mill Road and Marian Drive, and according to Technical Staff, measures 12 inches by 24 inches, which is consistent with Zoning Ordinance §59-F-4.2(a)(1). No additional sign is planned, per the Statement of Operations (Exhibit 20, p. 4).

There are no environmental issues in this case. According to Environmental Planning Staff, Forest Conservation Exemption 42010080E was issued for this site because the application is for an existing structure and the proposed use will not result in clearing of existing forest or trees. Exhibit 9. Environmental Planning Staff indicated that it “has no comments/concerns for the application.” Exhibit 28, Attachment 12, p. 2.

4. Operations:

Petitioner’s proposal for conducting the child day care center is set forth in her revised Statement of Operations (Exhibit 20). Petitioner notes therein that she is a certified Montessori teacher, specializing in early childhood learning (ages 2 - 6). She received her masters degree in consumer economics from the University of Maryland in College Park. Her varied working experience includes, *inter alia*, 10 years as a Chinese school teacher. The Petitioner’s husband holds a bachelors degree in electronic engineering, and he teaches the music program for young children at the childcare center and several local schools. Both are licensed by the Maryland Department of Education to operate a small childcare center at their home. They have been in the childcare business since 2003 and have been operating a childcare center at this property since February 2009.

Petitioner indicates in the Statement of Operations that the Little Genius Montessori Center is a very unique childcare center, as it is the only Chinese immersion program in a Montessori environment with a strong music program in Montgomery County, if not in the Washington Metropolitan area (and possibly in the country, based on the evidence). This assertion was supported by the testimony of a number of witnesses at the hearing. *e.g.*, Testimony of Natalie Hausknecht, 1/21/11 Tr. 32-33; and Dr. Diana Wobus, 1/21/11 Tr. 104-105.

The unique nature of this childcare facility and the quality of the program at the Little Genius Montessori Center were undisputed in this case. Nevertheless, no matter how praiseworthy the

program may be, it is the function of the Hearing Examiner to evaluate land use impacts in this case, and he therefore now turns to other operational characteristics such as staffing, hours of operation, timing of pickups and drop-offs, and outdoor activities.

a. Staffing:

The proposed child day care center will have a total of five full time employees. Two of these employees (Petitioner and her husband) reside at the daycare facility and will not make any trips during the AM or PM peak hour periods. There will be, at most, three non-resident, full-time employees, and one non-resident, part-time employee. The latter will arrive and depart during off-peak hours. The maximum staff is set forth as a condition in Part IV of this Opinion and Decision.

b. Hours of Operation:

The center's hours of operation hours are from 7:30 AM to 6:30 PM, Monday through Friday. These hours are also spelled out in a condition in the final part of this Opinion. The Statement of Operations (Exhibit 20, p. 2) indicates that the center will be closed on most federal holidays, and there will be a winter break between Christmas and New Year. It also specifies that there will be two or three parents' information nights held per year for enrolled families, usually in the evening, and there will be open houses "held occasionally" for prospective families, usually on Saturdays.

At the hearing, Petitioner testified that there would be two or three open houses during the year for waiting list parents and a Chinese New Year Party. 1/21/11 Tr. 245-249. Adding these open houses to the "parents' information nights" means that Petitioner plans to have between five and seven such extracurricular events related to the child care facility per year. To avoid undue imposition on the community, the Hearing Examiner will limit the number of extracurricular events per year to a maximum of five, as specified in a condition in Part IV of this document. Moreover, because Petitioner has not specified how parking would be handled for such events, the condition will

require that Petitioner arrange for parking off site (and not on Marian Drive) when the number of cars will exceed the 11 available parking spaces on the property and to arrange for transportation to the subject site.

c. Drop-off and Pick-up of Children:

The schedule for drop-off and pick-up of children is specified in the revised Statement of Operations (Exhibit 20, pp. 2-3):

Parents drop off their children between 7:30 and 10:30 AM. Departure time falls between 3:00 PM and 6:30 PM. Parents will arrive in staggered time slots. Parents must park their car and bring their child(ren) into the classroom. For departure, they need to come inside the classroom to pick up their child(ren). No child will be allowed to be outside alone without adult supervision. If an elementary school student attends the center for before and/or after school care, they will be picked up or dropped off by their parents or center staff. Children are not permitted to leave or enter the center unless accompanied by an adult.

	Arrival time	Departure time
Group One	7:30 – 8:30 AM	3 PM or 5:00 – 5:30 PM
Group Two	8:30 – 9:30 AM	3 PM or 5:30 – 6:00 PM
Group Three	9:30 – 10:30 AM	6:00 – 6:30 PM

The Planning Board, in its letter of January 19, 2011 (Exhibit 34), recommended that the Hearing Examiner “consider a condition limiting the number of parents dropping off and picking up children during each hour of the staggered arrival/departure periods . . .” The Hearing Examiner has given effect to this recommendation by a condition requiring that no more than ten vehicles arrive at the subject site during any one-hour period. This arrangement must be enforced through contractual agreement between the operator of the day care center and the parents.

This staggered drop-off and pick-up schedule should ensure that the arrivals and departures are spread out sufficiently to avoid unduly burdening the neighborhood. If Petitioner is ultimately permitted to have 30 children on site, this provision would allow for 10 children per hour to be dropped off or picked up, over the three-hour drop-off and pick-up periods. Furthermore, as noted by

Petitioner, some families may walk to the subject site and some families have two siblings attending the center, further reducing traffic.

d. Outdoor Activities:

One of the concerns of the neighbors is the potential noise from outdoor activities of the expanded day care center. The adjacent neighbor, Daniel Ra, testified that his home at 14300 Glen Mill Road abuts the back yard of the subject site, as shown on Exhibit 36, and therefore will be impacted by the increased outdoor activities. 1/21/11 Tr. 55-62. Since Exhibit 36 is a Google map of the area, the Hearing Examiner will take official notice of the following Google map showing essentially the same area, but with street names included for added clarity:¹⁷



¹⁷ The Hearing Examiner has also included the names of the other homeowners who testified in opposition, which were specified on Exhibit 36. That exhibit, submitted by the opposition, also contains red Xs and pushpins identifying the homes of those who signed a petition in opposition (14 homes on Marian Drive and 2 on Glen Mill Road). 1/21/11 Tr. 60.

Petitioner addresses the concerns about outdoor activities in a section of her revised Statement of Operations (Exhibit 20, p. 3):

Outdoor Activities

On the east side of the property, between Glen Mill Rd. and Marian Dr., there is a 4800 square-foot fenced playground. In order to minimize noise and maintain safety, the children will be divided into two groups. Each group will have a different schedule for outdoors play time both in the morning and in the afternoon. Toddlers and 2 year-olds will go outside first, then those 3 years old and up. Each group will have about 45 minutes in the morning and one hour in the afternoon. The maximum number of children playing outside at one time will not exceed 18. Occasionally when there are special events, such as holiday or an end of school year party, all enrolled children may be outside for a limited time.

It must be remembered that, under Zoning Ordinance §59-C-1.31(d), a child care facility for up to 12 children may be established in this zone even without a special exception (*i.e.*, as a matter of right). The Zoning Ordinance permits a larger day care facility (*i.e.*, a child day care center) in this zone by special exception, and it is thus expected that a certain amount of outdoor activities will be generated, no matter where in the zone the facility is established. In other words, a certain amount of outdoor activity and noise is an inherent characteristic of the special exception use.

Nevertheless, the Hearing Examiner can and will impose a number of conditions to minimize any disturbance to the neighborhood. These include limits on hours of operations, discussed above; limiting the number of children permitted to play outdoors at any one time to 18; prohibiting an outdoor public address system or amplified music; limiting the use of car horns to emergencies; requiring all children to be under the direct supervision of a staff member at all times, both inside and outside the building; requiring additional fencing on the property; requiring secured gates during outdoor play; and requiring the Petitioner to maintain the grounds in a clean condition, free from debris, on a daily basis. These restrictions should ensure proper maintenance of the grounds and should ameliorate the impact on the neighbors of the increase in outdoor activity inherent in the use.

C. Master Plan Conformance and Compatibility

The subject site is within the North Potomac Planning Area of the Potomac Subregion Master Plan, approved and adopted in 2002. The Master Plan text does not directly address the subject site, but it does provide a general “Special Exception Policy” (pp. 35-36), and the recommendations of that policy are reproduced below:

Recommendations

- Limit the impacts of existing special exceptions in established neighborhoods. Increase the scrutiny in reviewing special exception applications for highly visible sites and properties adjacent to the Chesapeake & Ohio Canal National Historical Park.

- Avoid an excessive concentration of special exceptions along major transportation corridors.

Sites along these corridors are more vulnerable to over-concentration because they have high visibility. Uses that might diminish safety or reduce capacity of roadways with too many access points or conflicting turn movements should be discouraged.

- Protect the Chesapeake & Ohio Canal National Historical Park, major transportation corridors and residential communities from incompatible design of special exception uses.

In the design and review of special exceptions uses, the following guidelines shall be followed, in addition to those stated for special exception uses in the Zoning Ordinance:

- a. Adhere to Zoning Ordinance requirements to examine compatibility with the architecture of the adjoining neighborhood. The Council is considering amendments to strengthen this section of the Zoning Ordinance.

- b. Parking should be located and landscaped to minimize commercial appearance. In situations where side or rear yard parking is not available, front yard parking should be allowed only if it can be adequately landscaped and screened.

- c. Efforts, should be made to enhance or augment screening and buffering as viewed from abutting residential areas and major roadways.

There are a number of private educational institutions in the planning area and concerns have been raised about parking and traffic problems caused by queuing for drop-off and pick up. The Council is considering amendments to the special exceptions provisions in the Zoning Ordinance to address these issues.

Technical Staff noted that the Master Plan does not specifically address child day care centers, but Staff found that the proposed use is in compliance with the Plan's recommendations for special exceptions (Exhibit 28, p. 4 and Attachment 10):

Staff has determined that the proposed use is compatible with the neighborhood due to the following: (1) The property will maintain its residential appearance – no external changes will be made to the dwelling unit on the subject site; (2) Only the basement/lower level of the property will be used for the operation of the facility; (3) there is a circular driveway on the property and a parking area that can provide up to 11 off-street parking spaces. In addition, several attendees of the day care center live nearby and walk to the property, further reducing traffic; and the rear and side yard of the property will be used as a play area and a six-foot high wood fence will be installed. The play area will have recreational equipment. . . .

Technical Staff's "Vision Division" expressly found "the proposed use to be appropriate for the location" and recommended approval. Exhibit 28, Attachment 10.

Although the subject site is not on a major transportation corridor, it is within an established neighborhood, and therefore any approval of the use should take care to limit impacts on the neighborhood. The Hearing Examiner agrees with Technical Staff's finding that the impacts are limited in this case. Petitioner's home is certainly architecturally compatible with the neighborhood, and parking will be in a side yard, which is adequately screened. Landscaping around the play area will be augmented by a six foot, wooden fence.

A word should also be said about the last paragraph from the Master Plan quoted above, which mentions concerns about parking and traffic problems caused by queuing for drop-off and pick up at "private educational institutions" in the area. Parking issues at the subject site have already been addressed in this Opinion, and traffic issues will be discussed in the next section. A number of neighbors have raised concerns about potential parking and traffic problems from an increase in the size of this child care facility; however, the potential problems from a child care facility should not be confused with those inherent in private educational institutions.

Although there are clearly educational aspects to modern child care facilities, a child care facility for up to 30 children has a much smaller enrollment, staff and physical plant than the typical private educational institution. Child care facilities also can stagger arrivals and departures of children over a three hour period, as will be done in the subject case. That generally is not done in schools, and one can expect large numbers of children to arrive at a school about the same time, usually during the peak traffic period. Private educational institutions, unlike childcare facilities, also tend to have a great many sporting events and extracurricular activities which often take place well into the evening. Thus, the impositions on a neighborhood from a private educational institution are usually much greater than those from a child care facility of the size suggested in this case.

Based on the record in this case, the Hearing Examiner finds that the special exception sought in the case at bar, as conditioned by the Hearing Examiner, will be compatible with the neighborhood and consistent with the recommendations of the Potomac Subregion Master Plan.

D. Transportation Issues

1. The Traffic Concerns of the Neighbors:

The biggest concern raised by the neighbors regarding the proposed increase in the size of the daycare operation relates to traffic volume and safety. Exhibits 27(a); 33(a) – (g), 60 and 60(b); 1/21/11 Tr. 43-77, 157-187, 191-204, 295-385; and 4/1/11 Tr. 110-144. Exhibit 27(a) is an opposition letter signed by 24 neighbors. The following paragraphs from the letter recite the essence of the neighbors' traffic concerns:

Marian Drive is a quiet residential street. The community was developed in 1955 and the infrastructure has not changed appreciably since that time. The street is narrow, with barely room for two vehicles going in opposite directions, to pass safely except at reduced speed. There are no sidewalks or shoulders, and the entirely residential properties terminate directly onto the street where vehicles pass. Many of the residents have lived in their homes for over 30 years.

Several years ago, Marian Drive experienced a substantial increase in traffic when the street opened up to the streets leading into the Willows, a large housing development that begins just past the end of Marian Drive, past Mary Knoll Drive. That increase in traffic resulted in the county posting speed signs (25 miles per hour) and, temporarily, some enhanced police traffic enforcement. Unfortunately, much of the additional traffic leaving the Willows proceeds down Marian Drive to exit onto Glen Mill Road at all times of the day and night, with heaviest traffic at the beginning and end of “rush hour” on business days, coextensive with the time that parents are dropping off and picking up children at the Center. The Center is located at the intersection of Marian Drive and Glen Mill Road. There is a stop sign at the end of Marian Drive and it is often difficult to exist [*sic*]either left or right at the intersection of Marian Drive and Glen Mill Road at these busy times. The traffic signal at the intersection of Glen Mill Road and Darnestown Road creates a line of traffic on Glen Mill Road that extends well past Marian Drive, making it impossible to turn left without pulling into traffic. In addition, there is a Ride-On bus stop on Glen Mill Road just to the right of Marian Drive, creating a potentially dangerous situation when Marian Drive traffic attempts to turn right onto Glen Mill Road. These circumstances regularly create a classic traffic jam at the end of Marian Drive, with several cars often waiting extended times to exit onto Glen Mill, and then moving rapidly onto Glen Mill at the slightest break in the traffic. Often, drivers get frustrated with the waiting and make u-turns to go back up Marian Drive to exit onto Glen Mill at the other end of Marian Drive (at Mary Knoll) or back through the Willows to exit at Bald Cypress/Viers Drive.

This situation is currently exacerbated by the arrival (during morning commute time) or departure (at evening commute time) of additional vehicle traffic as parents turn into Marian Drive from Glen Mill Road, dropping off and picking up children at the Center. This already dangerous traffic situation will be greatly intensified by the additional traffic associated with a better than twofold increase in the number of participants at the Center, should this ill conceived Exception be granted.

Those opposing the Petition believe there are real safety issues for Montgomery County to consider. Attached to this Opposition (at Tab 1) are several photographs taken at the end of Marian Drive in the vicinity of the Center. The amount of traffic is obvious and troublesome, and it can easily be extrapolated with the additional [*sic*]of new participants at the Center. Assume the Petition is granted and the Petitioners obtain permission for thirty (30) participants. Given the already incredibly stressed traffic patterns on Marian Drive, such added vehicular traffic is simply unacceptable. In a worst case scenario, that traffic could be increased by up to sixty (60) additional vehicles per day.

There are a number of young children living on Marian Drive at the present time, as well as numerous pets. There are no sidewalks on Marian Drive, mandating that residents walking their pets or walking with young children on foot or in strollers are subject to walking in close proximity to traffic. Drivers are unable to see around the corner when turning onto Marian Drive, and if a person or a vehicle is in

the road, a driver turning onto Marian Drive would not realize this until it was too late. In addition, Marian Drive slopes upward just past the Center and traffic heading in that direction (away from Glen Mill Road) cannot always see pedestrian traffic further up the street. This potentially hazardous situation will be greatly exacerbated with additional Center-related traffic, especially as the traffic patterns at the intersection of Marian and Glen Mill get more congested and more traffic goes up Marian Drive to use alternative exits to Glen Mill Road. This safety situation will be exacerbated even more by the recent addition of a paved bus stop directly in front of the Center, which will add stopped buses and arriving and departing bus passengers directly into the mix in front of the Center, adding to obvious traffic and safety issues.

There is limited parking at the Center and many of the added vehicles will have to drop off the children on the street, adding to the safety factors set forth above, in this case for the very children attending the Center. As stated above, Marian Drive slopes upward just past the Center and traffic coming down Marian Drive towards Glen Mill will literally have seconds to react to this added vehicular traffic, entering and leaving the Center, idling on the street, or driving up Marian Drive to avoid the congestion at Glen Mill Road.

The allegations in the opposition letter were buttressed by live testimony from the neighbors, including one very articulate 12½ year old, Jake Land. Young Mr. Land testified that traffic has gotten worse since the day care center opened, and that walking on Marian Drive in the vicinity of the day care center is not safe because the curve and hill make it difficult to see oncoming traffic.

1/21/11 Tr. 43-51. Jake Land's testimony was echoed by other witnesses in opposition, Andrew Ledner (1/21/11 Tr. 53-54); John Blick, who also mentioned that parking on Marian Drive near the subject site would create an additional hazard for pedestrians (1/21/11 Tr. 165-173); Robert Land (1/21/11 Tr. 191-204); Mary Kay Marchigiani, who emphasized the difficulty in trying to turn onto Glen Mill Road from Marian Drive because of the heavy traffic on Glen Mill Road (1/21/11 Tr. 295-320); Erica Land, who expressed her concerns about pedestrian safety, especially as it relates to people walking to and from the bus stop near the subject site, even though she now drives her son Jake to his bus stop (1/21/11 Tr. 321-341); Bryan Cook, who felt that people picking up their children at the daycare would be more distracted, which would further add to the traffic hazards around the

subject site (1/21/11 Tr. 342-385); and James Green, who introduced photographs (Exhibits 60(b)(1) –(12)) to demonstrate congestion and traffic hazards around the subject site (4/1/11 Tr. 110-144).

Some of Mr. Green's photographs are reproduced below:



Mr. Green argues (Exhibit 60, p. 5) that these photographs, including photographic evidence of children walking down Marian Drive, demonstrate the safety issues:

The risk is clear, the grade and curve of Marian Drive is obvious, and the granting of the Special Exception will simply place the residents of this Street in jeopardy for the commercial success of one resident.

In footnote 3 on the same page Mr. Green states,

We suggest that the pictures demonstrate that anyone attempting to walk only on grassy areas on Marian, in the absence of sidewalks, encounter mailboxes, drainage ditches, light poles, and other obstacles that force those pedestrians onto the street, even where the grassy area is clear of other impediments such as snow, ice, and mud.

2. The Petitioner's Response Regarding the Traffic Concerns:

The opposition submissions and testimony were met by letters in support, a survey regarding the traffic situation collected by the Petitioner from 13 parents who use the child care facility (Exhibit 57) and testimony regarding traffic from seven area residents who use the facility or pass by it frequently. 4/1/11 Tr. 14 – 110.

The parents' survey asked six questions, and a typical completed survey, with answers by Natalie Hausknecht, who also testified at the hearing, is reproduced below (Exhibit 57(a)):

Parents Survey on Traffic and Safety

Dear Parents,

Based on your experience when you drop-off and pick-up your child(ren):

1. Do you feel safe to drive around LGMC site?
☒ Yes ☐ No
2. Do you feel safe to turn on to Marian Dr. from Glen Mill Rd.?
☒ Yes ☐ No
3. Do you see many pedestrians on Marian Dr.?
☒ a. hardly see any ☐ b. very few ☐ c. many
4. Based on your experience, the traffic on Marian Dr. is:
☒ a. very light ☐ b. light ☐ c. heavy ☐ d. very heavy
5. Do you feel difficult to see pedestrians or other vehicles in this area?
☐ Yes ☒ No
6. Usually, how long it takes you to exit to Glen Mill Rd.:
☒ a. almost no wait ☐ b. about 1-2 minutes ☐ c. about 3-5 minutes
☐ d. about () minutes () seconds

The other survey responders answered in similar fashion. All answered “Yes” to question 1 (Do you feel safe around the LGMC¹⁸ site?) and question 2 (Do you feel safe to turn on to Marian Dr. From Glen Mill Rd.?). All answered “No” to question 5 (Do you feel [*sic*]difficult to see pedestrians or other vehicles in this area?). Ten of the 13 answered question 3 that they “hardly see any” pedestrians on Marian Drive, and 11 of the 13 answered question 4 that traffic on Marian Drive is “very light.” Two of the parents characterized the traffic on Marian Drive as “light,” rather than “very light,” and three indicated that they see “very few” pedestrians on Marian Drive, rather than “hardly see any.” Nine of the 13 answered question 6 saying that they had “almost no wait” to exit onto Glen Mill Road. Three answered that they had to wait “about 1-2 minutes” and one responded that the question was not applicable. Clearly, the sense of the survey response is that neither traffic volume nor traffic safety is a problem on Marian Drive.

At the hearing on April 1, 2011, seven new witnesses testified in support of the petition based on their experiences regarding traffic at and around the subject site. Robin Shepherd testified that her daughter attended the Little Genius Montessori Center from September 2009 through September 2010. She did not encounter any traffic difficulties on Marian Drive or Glen Mill Drive and never had any concerns for her safety nor saw any safety concerns in the neighborhood. She felt that the parking lot had ample parking and the surrounding areas had plenty of room for pedestrians. It would take about five minutes to drop her child off. Ms. Shepherd would regularly turn left from Marian Drive onto Glen Mill Road at about 9:00 or 9:30 in the morning and from 5:00 to 6:00 in the evening, without experiencing any delays. She might have to wait briefly for a break in the traffic on Glen Mill, but there was never more than one car backed up on Marian Drive waiting to turn. “It's not a very busy road.” 4/1/11 Tr. 14-18. Similar testimony was given by Stacy Carr, who drives past the subject site many times during the day transporting her five children to one location or another

¹⁸ LGMC stands for “Little Genius Montessori Center.”

(4/1/11 Tr. 25-35); Yubin Du, who frequently walks along Marian Drive from the bus stop at Glen Mill Road and does not feel afraid from the traffic around the subject site (4/1/11 Tr. 35-48); Wei Xu, who drops off his son at the subject site about 9:30 a.m., picking him up about 5:30 p.m., and in his experience, the traffic volume is very low on Marian Drive (4/1/11 Tr. 94-98); Bingbing Deng, who has about the same drop-off/pick-up schedule, and doesn't have any problem with the traffic or safety on Marian Drive, although during the evening rush hour she may have to wait a couple of minutes to get out onto Glen Mill Road (4/1/11 Tr. 98-103)); Veronica Pei, who turns both left and right from Marian Drive onto Glen Mill Road, and experiences no problems getting onto Glen Mill Road, even when there is traffic on Glen Mill Road because those cars are slowing for the light at Darnestown Road (4/1/11 Tr. 103-107); and Joan Chen-Mai, who drops off her child at the subject site between 9:30 and 10:30 a.m., never sees any pedestrians there, and has no problem making a left off of Glen Mill Road onto Marian Drive (4/1/11 Tr. 107-110).

3. Evaluation of Traffic issues by Technical Staff and MCDOT:

Despite repeated invitations by the Hearing Examiner, neither party elected to call an independent traffic engineer or transportation planner as an expert witness in this case. The only expert evidence in this case on the subject comes from the Transportation Division of Technical Staff, in Exhibit 53 and Attachment 11 to Exhibit 28, and from the County's Department of Transportation (MCDOT), in Exhibit 64(q).

Transportation Planning Division of Technical Staff evaluated the transportation issues as follows in its January 4, 2011 Memorandum (Attachment 11 to Exhibit 28):

Transportation Planning staff has reviewed the existing child day care facility's proposal to increase the number of students up to 30 from the currently approved 12 and finds that the proposed increase of children would not have an adverse effect on the nearby road system. The site is located off Marian Drive which was built as a tertiary residential street with 50-foot-wide right-of-way and 20-foot-wide pavement

width. The existing vehicular access point and pedestrian circulation system on the nearby road system would not be affected by the proposal.

Based on the information contained in the Statement of Operations regarding the number of additional students and employees, the site would generate approximately 15 AM and 14 PM peak hour trips during the weekdays peak period. Therefore, it is meeting the Local Area Transportation Review [LATR] requirements because the site is generating less than 30 peak-hour trips. It is estimated that of the local trips, less than 5 trips will be new (trips that are not pass-by or diverted) and of those trips, 35% are required to be mitigated is part of meeting the Policy Area Mobility Review (PAMR) mitigation for the sites located within the R&D Policy Area. However, of all the employees, 50% or at least 3 peak hour trips are being mitigated due to employees residing on site or making off peak trips to the site. Therefore, the application is meeting the PAMR requirements.

It is therefore staff's conclusion that the application meets the transportation requirements and [Transportation Planning staff] has no objection to any approval of this application. [Emphasis added.]

Because the lay evidence produced at the January 21, 2011, hearing raised serious questions regarding traffic volume and safety issues, the Hearing Examiner e-mailed Technical Staff and asked them to reevaluate the transportation concerns. On January 31, 2011, Transportation Planning Division responded with the following statement (Exhibit 53):

We have reviewed the transportation issues raised by the citizens and requested by you to address. Based on our further review, we find that the site-generated traffic would not adversely impact the traffic operation of the Marian Drive/Glen Mill Road intersection. The day care center with additional 18 students would generate approximately 15 AM and 14 PM peak-hour trips during the weekdays peak period which represent one trip every 4 minutes during the peak hour. It is our understanding from the statement of operation and discussion with the Applicant that all generated trips to the site will be dispersed during three hours of peak period. This dispersion of traffic will certainly reduce the impact perhaps by one third, significantly less than what is estimated for the cumulative traffic impact. It is also estimated that of the total trips, less than 5 trips will be new (trips that are not pass-by or diverted) and these minimal trips should not adversely affect the existing traffic operation in the area. The area is a relatively new subdivision and the existing street layout has been approved by the MCDOT with appropriate evaluation of safe sight-distance for the existing crossing points. Transportation Planning staff finds that the existing vehicular access point and traffic operation on the nearby road system would not be affected unsafely by the proposed expansion of the Child Day Care Facility at 14315 Marian Drive. [Emphasis added.]

In addition, MCDOT responded to an e-mail inquiry from Petitioner (Exhibit 72) with the following letter dated February 17, 2011 (Exhibit 64(q)):

Dear Ms. Zhang:

Thank you for your request regarding traffic operations and safety on Marian Drive and at the intersection of Marian Drive and Glen Mill Road. You indicated that your neighbors have some traffic operations and safety concerns on the curvature along Marian Drive and at the intersection of Marian Drive and Glen Mill Road.

We conducted a field review at the locations mentioned above and would like to share our findings with you. Our review revealed that the existing traffic control devices are visible and reasonable. There is a curvature on Marian Drive, about 700' west of Glen Mill Road. The sight distances approaching the curve are adequate and the estimated traffic volume is very low along Marian Drive. Current traffic conditions do not reveal additional traffic control devices are necessary on Marian Drive at this location.

We also reviewed traffic operations and safety on Marian Drive at Glen Mill Road, although this section of Glen Mill Road is maintained by the City of Rockville. Our review revealed that the existing sight distances are adequate when looking north and south on Marian Drive at Glen Mill Road. The existing stop sign is visible and the estimated intersection delay is minimum based on the estimated traffic volume along Marian Drive. Additional traffic control devices are not necessary on Marian Drive at Glen Mill Road at this time.

We hope that this information is helpful to you and appreciate your interest in these matters of traffic control and safety. [Emphasis added.]

4. The Hearing Examiner's Findings on the Transportation Issues:

The Hearing Examiner realizes that the issue of traffic volume and safety is a serious concern to the neighbors living on Marian Drive. They certainly introduced enough testimony to cause the Hearing Examiner to ask Technical Staff to further review this matter. However, Zoning Ordinance §59-G-1.21(a) requires the Hearing Examiner to apply a "preponderance of the evidence" standard to his evaluation of the case, and the balance of evidence on the traffic issues clearly weighs in favor of the Petitioner. As is apparent from the above discussion, there was lay evidence on both sides of these issues, but all of the expert evidence, which consists of evaluation and re-evaluation by Technical Staff's Transportation Planning Division and a "field review" by MCDOT quoted above,

supports the conclusion that approval of the expanded day care will not create undue traffic volume or traffic safety issues. The case law regarding special exceptions instructs us that we must not elevate general fears expressed by the neighbors above the probative evidence offered by experts. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970).

In the absence of contrary expert evidence, the Hearing Examiner finds that the preponderance of the evidence weighs in favor of a finding that the proposed special exception, as conditioned by the Hearing Examiner, will satisfy LATR and PAMR; will not have an adverse effect on the County's transportation system; will not create an undue traffic volume or safety problem in the neighborhood; and thus will not create a nuisance because of traffic. One could argue that every additional car in a neighborhood creates an additional hazard. Yet, as a matter of public policy, the Zoning Ordinance permits additional uses if they meet specified standards. The weight of the evidence in this case demonstrates that the proposed use will meet those standards.

A word should be said about the opposition's reliance on the recent OZAH decision in *SE-10-1, Petition of Stephen and Patricia Edelen*. Exhibit 60, pp 5-6. The Hearing Examiner is very familiar with the facts in *Edelen* because he decided that case. The case at bar is very different from *Edelen*.

In *Edelen*, the petitioners proposed a single entrance/exit onto a very heavily traveled, major roadway, Connecticut Avenue, northbound. The evidence clearly established in that case that cars would likely have to stop and wait on Connecticut Avenue in the evening rush hour, while vehicles exited the site, in order to have enough clearance within the entrance/exit to turn into the site. That process was unlikely to move quickly because the parking proposed for the site would require cars to be stacked three deep within an enclosed area (*i.e.*, some parked cars would effectively block other cars in under that proposed arrangement, and therefore considerable maneuvering would be needed to

get cars in and out). Connecticut Avenue, northbound, has very narrow lanes in that area, and there had been thirteen accidents northbound on Connecticut between Bradley Lane and Raymond Street (*i.e.*, in the single block in front of the Petitioners' home) in the five year period, from 2006 to 2010. One of those accidents involved a vehicle attempting to exit the driveway of the Edelens' property on June 2, 2010, as evidenced by a police report. Though there was conflicting expert evidence, the hazardous nature of that situation was testified to by an expert traffic engineer whom the Hearing Examiner found to be credible.

None of these conditions obtain in the case at bar. Marian Drive is not a busy thoroughfare, and the Zhang property has a circular drive with both an entrance and an exit. The photographic evidence demonstrates that cars will have enough room to get into and out of the parking spaces without a great deal of maneuvering. There was no evidence introduced of accidents on Marian Drive near Petitioner's home, and all of the expert evidence finds no problem with traffic volume or safety. Moreover, if as feared by some neighbors, exiting from Marian Drive onto Glen Mill Road is slowed to some degree by additional vehicular traffic, they have many other choices of exits from the community. Exhibit 64(o). Under these circumstances, the Hearing Examiner cannot and does not find that a safety hazard or traffic nuisance is likely. However, that does not mean that the grant of the special exception cannot be conditioned to ensure protection of the neighborhood, pursuant to Zoning Ordinance §59-G-1.22(a). In order to do this, the Hearing Examiner will impose the following conditions:

- The number of children enrolled at the center shall not exceed 22 children, ages eighteen months to six years, until approved by the Hearing Examiner after a follow-up hearing which may be scheduled after one year of operation under this special exception. In no event shall the number of children exceed the number authorized by State licensing authorities, and the ages of the permitted children will be determined by State licensing authorities. The follow-up hearing will be scheduled if a request is received by the Office of Zoning and Administrative Hearings from the Petitioner on or after one year from the date of this Opinion and Decision. Concurrent with any

such request, Petitioner must ask Technical Staff to review traffic volume, traffic safety and parking operations for the year of operations at the increased enrollment, and to submit a report to the Hearing Examiner with their findings. Any follow-up hearing will be formally noticed to all parties, and it will review traffic and parking concerns raised by members of the community prior to determining whether the number of children permitted on site should be increased to 30.

- The number of non-resident staff present at the facility at any one time may not exceed three full-time employees and one part-time employee, in order to limit the impact on traffic and parking in the area.
- The hours of operation will be between 7:30 a.m. and 6:30 p.m., Monday through Friday. Child care will not be provided on weekends or overnight at any time.
- Arrival and departure times for the children shall be staggered between 7:30 a.m. and 10:30 a.m. during the morning drop-off and between 3:00 p.m. and 6:30 p.m. in the evening, so that no more than ten vehicles are arriving during any one-hour period. This arrangement must be enforced through contractual agreement between the operator of the day care center and the parents. In no event may a child be dropped off before Petitioner or a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
- Petitioner must provide in its contracts with patrons of the facility that automobiles are not to be parked on Marian Drive while dropping off or picking up children. If an event is held at the subject site in connection with the day care that requires more parking than those available on the subject site, then Petitioner must arrange for off-site parking and transportation to the subject site, and the off-site parking may not be on Marian Drive. Such events must be limited to no more than five per year – one Chinese New Year Party; two parents' information nights for enrolled children; and two open houses for waiting list parents.

With these limitation, it is unlikely that the traffic conditions the neighbors already observe on Marian Drive near the subject site and at the intersection with Glen Mill Road will be significantly affected by the expansion of the day care. The number of additional vehicles will be small and their arrivals will be staggered over three hour periods. Parking on Marian Drive will be restricted, and no further expansion will be allowed without further study.

E. Community Reaction

As mentioned elsewhere in this Opinion, the subject petition has great support from users of its services and much opposition from the immediate neighborhood. Pre-hearing letters of support

stressed the merits of the existing program (Exhibits 16-19, 22, 24, 25, and 29-31), which is reportedly “the only Chinese immersion program in a Montessori environment” in the County (Exhibit 20), if not in Washington Metropolitan area (and possibly in the country). 1/21/11 Tr. 32-33; 104-105.

A pre-hearing letter and petition in opposition, signed by 24 residents of the neighborhood, raised concerns about increased traffic volume, traffic safety, parking, appearance, commercialization and possibly increased noise and disruption of the neighborhood which may be occasioned by the increased enrollment proposed for the facility. Exhibits 27(a)-(g).¹⁹ Similar concerns were raised in other pre-hearing opposition letters (Exhibits 33(a) – (g)).

Nine witnesses, in addition to the Petitioner, testified at the initial hearing in support of the petition, based on the virtues of the day care program currently run by Petitioner and the need for it in the community. 1/21/11 Tr. 28-42; 78-156; 188-190; and 205-294. Nine neighbors testified in opposition. 1/21/11 Tr. 43-77; 157-187; 191-204; and 295-385. The vast majority of the opposition testimony addressed concerns about traffic volume and safety and parking.

At the April 1, 2011 hearing, nine witnesses testified in support of the petition (including Petitioner’s husband and brother), addressing the traffic and parking issues (4/1/11 Tr. 14-110). Opposition organizer, James Green, testified for the opposition and identified photographic evidence supporting his position. 4/1/11 Tr. 110-144.

¹⁹ Attached to Exhibit 27(c) were reports of facility inspections conducted by the Maryland Department of Education. Alleged violations of Maryland’s child care regulations are evaluated by State authorities and not by this office; however, Petitioner is required to file, and has filed, an “affidavit of compliance” (Exhibit 59) pursuant to Zoning Ordinance §59-G-2.13.1(a)(4), in which Petitioner certifies that she will comply with all applicable State and County requirements; correct any deficiencies found in any government inspection; and be bound by the affidavit as a condition of approval for this special exception. If the State advises OZAH that Petitioner is and continues to be in non-compliance with State regulations, following the granting of the special exception, that situation would be evaluated as a possible failure to comply with conditions of the special exception; however, the question of compliance with State regulations in operation of the facility must be addressed initially by the State regulators, following issuance of the special exception. Thus, it is not an issue for this evaluation of the special exception application.

It should be observed that the decision on a zoning matter “is not a plebiscite.” *Rockville Fuel v. Board of Appeals, supra*, 257 Md. at 192, 262 A.2d at 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance.

The traffic volume and safety issues were discussed at length in Part II. D. of this Opinion, along with the Hearing Examiner’s findings, and conditions that will be imposed to ensure that the neighborhood is protected. Parking issues were addressed in Part II. B. 2. of this Opinion, and concerns about noise from the play area were discussed in Part II. B. 4. Additional conditions were referenced there to ameliorate any noise from the play area, including erection of an additional fence, restrictions on the number of children allowed to play outdoors at one time and a prohibition against the use of amplified sound outdoors.

The opposition also raised concerns about the possible impact of “commercialization” on property values and other issues.²⁰ John Blick, who lives on Marian Drive, testified that in his lay opinion, the proposed child day care center would reduce property values in the neighborhood. Although he is a real estate broker, he was not offered as an expert witness. 1/21/11 Tr. 163. James Green, the opposition coordinator, also noted that the opposition felt their property values would be adversely affected. 1/21/11 Tr. 282. Mary Kay Marchigiani, another Marian Drive resident, also testified that the appraised value of her property had declined since the day care was established, but

²⁰ One neighbor, Bryan Cook, raised an issue in his opposition letter (Exhibit 33(d)) regarding the adequacy of notice to the community based on his claim that the telephone number on the notice sign was not operative. A photograph attached to the Technical Staff report (Exhibit 28, Attachment 10, Figure 2) clearly shows the notice sign and the telephone number on it – 240 777-6666. The Hearing Examiner called that number and it rang in OZAH’s office. Moreover, formal notices specifying the hearing date, time and location, as well as the location where the file could be examined, were mailed out to adjoining and confronting neighbors and affected civic associations. As evidence that the community had ample notice, practically the entire immediate neighborhood (24 people) signed an opposition petition (Exhibit 27) and nine neighbors appeared to testify in opposition at the hearing. Based on these circumstances, the Hearing Examiner finds Mr. Cook’s claim of inadequate notice to be without foundation.

she admitted that she had no way of knowing whether the decline was caused by the opening of the child care facility. 1/21/11 Tr. 319-320.

Pauline Jih, a friend of Petitioner who does not live near the subject site, but who has been a real estate agent for almost 25 years, testified as a lay witness that having this child care facility in the neighborhood should increase nearby property values. 1/21/11 Tr. 205-213.

The Hearing Examiner finds this lay testimony regarding property values to be inconclusive. Moreover, even if this child day care center located within a residence could be characterized as commercializing the neighborhood and even if there had been substantial evidence of some impact on property values, it would not be dispositive in this case because the evidence supports the conclusion that the characteristics of the subject site and the impacts of its activities, adverse or otherwise, are inherent in a child day care center use. Exhibit 28, p. 7. The question is not whether the proposed use will create some adverse effects. Because this use requires a “special exception,” it is assumed that there may be some adverse effects (*i.e.*, inherent adverse effects) in all special exceptions of this type. Nevertheless, the Council elected to make this type of special exception available in this zone. We therefore must apply a statutory standard, which is spelled out in Part III of this Opinion. It provides that “[i]nherent adverse effects alone are not a sufficient basis for denial of a special exception.” Code § 59-G-1.2.1. These standards and the Hearing Examiner’s evaluation of this case, in light of these standards, will be discussed in the next part of this Opinion.

III. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in

others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 28 and 34).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. This provision specifies, “Inherent adverse effects alone are not a sufficient basis for denial of a special exception.” Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “child day care center” use. Characteristics of the

“Little Genius Montessori Center” that are consistent with the “necessarily associated” characteristics of child day care center uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with child day care center uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a child day care center (Exhibit 28, p. 7):

- (1) vehicular trips to and from the site;
- (2) outdoor play areas;
- (3) noise generated by children;
- (4) drop-off and pick-up areas; and
- (5) lighting

To this list, the Hearing Examiner would add the need for sufficient parking spaces on site, in accordance with Zoning Ordinance §59-E-3.7.

Technical Staff concluded “There are no non-inherent effects of the use.” Exhibit 28, p. 7. As stated by Staff,

. . . There are no significant traffic impacts that would result from the proposed special exception. The plan provides adequate parking to serve the use. The large driveway and the proposed parking layout serve as drop-off and pick-up areas for children. Existing lighting on the property is adequate and consistent with the residential character of the neighborhood. No new lighting will be added. There will be no changes to the existing dwelling or to the parking area in front of the dwelling, or to the play area in the side yard. The front and rear yards are well landscaped with mature trees. Trees, flowers and shrubbery are located in the front, side and rear yards of the dwelling. There are no non-inherent effects of the use.

The neighbors raised a number of issues – noise, traffic volume, traffic safety, parking and

property values, all of which have been discussed at length in Part II of this Opinion. Although Petitioner's neighbors have expressed some legitimate concerns about noise, traffic and parking, the adverse effects they fear are largely inherent in the operation of this type of facility. There are no unusual site conditions. Even if one were to consider the sloping curve in Marian Drive adjacent to the Zhang home as an unusual site condition, the uncontroverted expert evidence offered by both Technical Staff and MCDOT, as detailed in Part II of this Opinion, is that no traffic safety hazard would be thereby created.

The Hearing Examiner finds that the relevant site and operational characteristics of the proposed use are consistent with the inherent characteristics identified for a child day care center. The building is not of an unusual size or design for the neighborhood, but rather is an existing one-family residence in a residential area; the outdoor play area is enclosed by a fence, and an additional wooden fence will be added; given the size of Petitioner's parking area, and the staggered arrival of children, no additional on-street spaces should be needed to provide adequate parking for employees and discharge and pickup for the users; lighting is residential in style and will not be increased for this special exception; the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR); and operations at the day care center, from a land use perspective, will be consistent with the typical operations of such a facility.

There may be adverse effects, but they are of a kind that is typically created by this type of use (*i.e.*, inherent), and the Council elected to permit this use in this Zone. Moreover, the adverse effects can be addressed, to some extent, by conditions imposed on the special exception. The following conditions will be imposed to reduce any adverse impacts upon the neighborhood. No more than 18 children will be permitted to play outdoors at any one time, in order to reduce noise which may affect the next-door neighbors. Petitioner will not be allowed to use a public address system of any kind

outside the building, nor will any amplified music be played outside the building. Petitioner must require that parents accessing the facility not blow their car horns absent an emergency. Interviews of prospective or current clients must be held during non-peak traffic hours to avoid unnecessary impacts on local traffic and parking. Parking on Marian Drive will be prohibited for those dropping off and picking up children at the day care center. The number of extracurricular events at the site will be limited to five per year. Petitioner will be required to provide off-site parking and transportation for the few permitted events which would require more parking than is available on site. Staggered arrivals will be required for daily use, and operations will be limited to 22 children during the first year of operations.

Since a group day care home is already operating on the site for up to 12 children, the Hearing Examiner finds that allowing up to a maximum of 22 children for the first year of expanded operations is unlikely to significantly increase any adverse effects upon the neighbors. After one year of operations under the special exception, Petitioner may file a request with the Office of Zoning and Administrative Hearings to expand to a maximum of 30 children. Concurrent with any such request, Petitioner must ask Technical Staff to review traffic volume, traffic safety and parking operations for the year of operations at the increased enrollment, and to submit a report to the Hearing Examiner with their findings. Any follow-up hearing will be formally noticed to all parties, and it will review traffic and parking concerns raised by members of the community prior to determining whether the number of children permitted on site should be increased to 30.

B. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The record in this case provides adequate evidence that the specific standards would be satisfied, as outlined below.

Sec. 59-G-2.13.1. Child day care facility.

(a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan (Exhibit 3) and revised Landscape and Lighting Plan (Exhibit 21) satisfy this requirement.

(2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

(A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required;*
or

(B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:

Child day care facility. . . . For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance. [Emphasis added.]

Technical Staff found the available parking to be sufficient. Exhibit 28, p. 10. The issue of parking was discussed in Part II. B. 2. of this Opinion. For the reasons stated there, the Hearing Examiner finds that the on-site parking is adequate and meets the statutory standard.

(3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: Technical Staff found that “The existing circular driveway provides adequate area for the discharge and pick-up of children.” Exhibit 28, p. 11. Actually, under Petitioner’s plan, parents would park in the parking area on the side of the house (not in the circular drive) and walk their children into the facility for drop-off; they will park and walk their children out of the facility for pick-up. Exhibit 20, p. 2. As required by Zoning Ordinance §59-E-3.7 and discussed above, the available parking is adequate for this purpose, especially with the staggered arrivals required in this case. Conditions specified in Part IV of the Opinion will require Petitioner to stagger drop-offs and pickups so that no more than ten vehicles visit the site within any one-hour period to drop off or pick up children. Based on these facts, the Hearing Examiner finds that an adequate area for the discharge and pick up of children is provided.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 59).

(5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: As discussed in Part II. C. of this Opinion, Technical Staff has concluded that the proposed use will be compatible with the neighborhood. The Hearing Examiner agrees because the use will be conducted in an existing residence which has architecture compatible with the neighborhood, and the operational impacts of the use are those

which are inherent in child day care facilities. The use already exists in the residence as a matter of right in the R-200 Zone, and the effects of its expansion will be limited by conditions which specify hours of operation during normal weekday work hours; limit the number of children permitted to play outdoors at any one time; prohibit amplified sound outdoors; and require additional fencing.

Moreover, the evidence also demonstrates that the proposed use would not result in a nuisance because of traffic or parking, for the reasons discussed in Parts II. B. and II. D. of this Opinion. Based on these factors, the Hearing Examiner finds that, with the recommended conditions, the use will be compatible with surrounding uses and will not result in nuisance because of traffic, parking, noise or any type of physical activity.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The record in this case provides ample evidence that the general standards would be satisfied, as outlined below.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

- (1) *Is a permissible special exception in the zone.*

Conclusion: A group day care home use is a permissible special exception in the R-200 Zone, pursuant to Code § 59-C-1.31(d).

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. B. of this Opinion, above.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site is within the North Potomac Planning Area of the Potomac Subregion Master Plan, approved and adopted in 2002. For all the reasons set forth in Part II. C. of this Opinion, the Hearing Examiner finds that the proposed use is consistent with the objectives and recommendations of the Potomac Subregion Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*²¹

²¹ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

Conclusion: The proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to that structure. The rear yard play area is completely fenced in and additional wooden fencing will be added. As discussed in Part II. D. of this Opinion, both Technical Staff and MCDOT found that the additional traffic created by the proposed expansion of the use will not create traffic volume or safety problems. The parking is adequate, and can handle the pick-up and drop-off of children. There are no other child day care special exceptions in the general neighborhood, so there is clearly not an excess of similar uses. The Hearing Examiner so finds.

(5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have only inherent effects on the general neighborhood, and it will provide a useful service for the community.

(6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception, as conditioned, will cause only such noise and physical activity as is inherent in this type

of use, wherever it might be located in this zone. Technical Staff found that “The exterior illumination consists of residential style fixtures, providing safety for parents and children entering and exiting the facility without causing glare to surrounding properties.” Exhibit 28, p. 6. No new lighting will be added, and operations cease at 6:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports only one other special exception in the neighborhood. Exhibit 28, Attachment 1. Therefore, the Hearing Examiner finds that the child day care center proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the applicable Master Plan, and therefore, under the terms of this criterion, will not alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents,

visitors or workers in the area at the subject site. Although the traffic safety issue was hotly contested in this case, the only expert evidence on the subject came from Transportation Planning Division of Technical Staff and MCDOT, both of which concluded that safety would not be impinged by the expanded use. This issue was reviewed at length in Part II. D. of this Opinion. In order to ensure that the expanded facility can operate safely, it will be permitted to increase only to 22 children during its first year of operations under the special exception. Expansion to 30 children will require further review.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that the proposed use “will continue to be adequately served by public facilities.” Exhibit 28, p. 9. There is no contrary evidence, and the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*
- (B) *If the special exception:²²*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception’s impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

²² This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). Transportation Planning Staff did do such a review, and concluded that both LATR and PAMR are satisfied, as discussed in Part II. D. of this Opinion. For the reasons set forth therein, the Hearing Examiner agrees with their conclusions and so finds.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the use as proposed “will not reduce the safety of vehicular or pedestrian traffic because the existing driveway and parking area is large enough to accommodate the drop-off and pick-up of children. The applicant will also stagger arrivals and departures.” Exhibit 28, p. 10. The preponderance of evidence supports that finding, as previously discussed, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

D. Additional Applicable Standards

59-G § 1.23. General development standards

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The subject property is located in the R-200 Zone, which permits the proposed use by special exception. As noted by Technical Staff (Exhibit 28, p. 5), “The proposal conforms to all applicable development standards of the R-200 zone.” The following table from page 5 of the Staff report (with corrections by the Hearing Examiner discussed in Part II. A. of this Opinion) lists the applicable standards and the existing measurements for the subject site:

Development Standard	Required	Proposed/Existing
Minimum Lot Area	20,000 sq. ft.	1.344 acres
Minimum Lot width: <ul style="list-style-type: none"> ▪ at front building line ▪ at street line 	100 feet 25 ft.	300+ ft. 330 ft.
Minimum Building Setback: Front Yards	40 ft.	66.5 ft.
Side Yards <ul style="list-style-type: none"> ▪ One side ▪ Sum of both sides 	12 ft. 25 ft.	90 ft. (west side) 205 ft. approx.
Rear Yard	30 ft.	80 ft. approx.
Maximum Building Height	2 ½ stories or 35 ft	2 ½ stories
Parking	10 ²³ parking spaces	11 parking spaces

(b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7. As previously discussed in Part II. B. 2. and elsewhere in this Opinion, the Hearing Examiner finds that there is sufficient parking to meet the Code requirements.

²³ Eleven parking spaces would be required if the part-time, non-resident employee parks on the site during pick-up or drop-off times.

- (c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
 - (6) *Riding stables.*
 - (7) *Helipport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site's frontage, which meets required standards.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations (Exhibit 9). No trees will be removed.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

- (f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: There is an existing, non-illuminated, free-standing sign identifying the name of the child care center, “Little Genius Montessori Center, ” and the telephone number of the business. The sign is located at the corner of Glen Mill Road and Marian Drive, and according to Technical Staff, measures 12 inches by 24 inches, which is consistent with Zoning Ordinance §59-F-4.2(a)(1). No additional sign is planned, per the Statement of Operations (Exhibit 20, p. 4). A condition will be imposed which provides that Petitioner must obtain a permit from the Department of Permitting Services for the existing, non-illuminated sign advertising the child care facility. The sign may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH.

- (g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

- (h) **Lighting in residential zones.** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that “The exterior illumination consists of residential style fixtures, providing safety for parents and children entering and exiting the facility without causing glare to surrounding properties.” No new lighting will be added, and operations cease at 6:30 p.m. Exhibit 28, pp. 6-7. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the child day care center use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 11-2 for a special exception in the R-200 Zone to operate a child day care center for up to 30 children in an existing single-family detached home, at 14315 Marian Drive, Rockville, Maryland, is **GRANTED** subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by her representations and those of her counsel identified in this Opinion and Decision.
2. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 59, in which Petitioner certified that she will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.

3. The number of children enrolled at the center shall not exceed 22 children, ages eighteen months to six years, until approved by the Hearing Examiner after a follow-up hearing which may be scheduled after one year of operation under this special exception. In no event shall the number of children exceed the number authorized by State licensing authorities, and the ages of the permitted children will be determined by State licensing authorities. The follow-up hearing will be scheduled if a request is received by the Office of Zoning and Administrative Hearings from the Petitioner on or after one year from the date of this Opinion and Decision. Concurrent with any such request, Petitioner must ask Technical Staff to review traffic volume, traffic safety and parking operations for the year of operations at the increased enrollment, and to submit a report to the Hearing Examiner with their findings. Any follow-up hearing will be formally noticed to all parties, and it will review traffic and parking concerns raised by members of the community prior to determining whether the number of children permitted on site should be increased to 30.
4. The number of non-resident staff present at the facility at any one time may not exceed three full-time employees and one part-time employee, in order to limit the impact on traffic and parking in the area.
5. The hours of operation will be between 7:30 a.m. and 6:30 p.m., Monday through Friday. Child care will not be provided on weekends or overnight at any time.
6. Arrival and departure times for the children shall be staggered between 7:30 a.m. and 10:30 a.m. during the morning drop-off and between 3:00 p.m. and 6:30 p.m. in the evening, so that no more than ten vehicles are arriving during any one-hour period. This arrangement must be enforced through contractual agreement between the operator of the day care center and the parents. In no event may a child be dropped off before Petitioner or a staff

member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.

7. Petitioner must provide in its contracts with patrons of the facility that automobiles are not to be parked on Marian Drive while dropping off or picking up children. If an event is held at the subject site in connection with the day care that requires more parking than those available on the subject site, then Petitioner must arrange for off-site parking and transportation to the subject site, and the off-site parking may not be on Marian Drive. Such events must be limited to no more than five per year – one Chinese New Year Party; two parents' information nights for enrolled children; and two open houses for waiting list parents.
8. Children must be accompanied by an adult to and from the child-care entrance.
9. No more than 18 children are permitted to play outdoors at any one time.
10. Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building. Parents accessing the facility may not blow their car horns absent an emergency, as this condition is intended to preclude sounding of horns when a car is locked by remote control or other unnecessary use of car horns.
11. All children must be under the direct supervision of a staff member at all times, both inside and outside the building. All gates or other access to the back yard must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.
12. The Petitioner shall maintain the grounds, daily, in a clean condition, free of debris.
13. Interviews of prospective or current clients must be held during non-peak traffic hours to avoid unnecessary impacts on local traffic and parking.

14. Petitioner must provide all the fencing and landscaping depicted on the Site and Landscape and Lighting Plans (Exhibits 3 and 21). The applicant must erect a 6-foot high fence along the Glen Mill Road property line and part of the northeast property line of Marian Drive. The fence must comply with the Department of Permitting Services (DPS) requirements for construction of a fence.
15. Petitioner must obtain a permit from the Department of Permitting Services for the existing, non-illuminated sign advertising the child care facility. The sign may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH.
16. Petitioner must comply with Maryland State and Montgomery County licensure requirements and standards for the operation of a child day care facility. Petitioner must also comply with her revised Statement of Operations (Exhibit 20), but the conditions specified in this Opinion and Decision control in the event of any conflict.
17. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: May 4, 2011

Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: Petitioner
 All parties of record
 The Planning Board
 Department of Finance
 All parties entitled to notice of filing